

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
May 16, 2011, 3:54 pm  
BY RONALD R. CARPENTER  
CLERK

No. 84686-3  
(Consolidated with No. 85012-7) ————— RECEIVED BY E-MAIL

bjh

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

OLGA MATSYUK, individually, and on behalf of all those similarly  
situated,

Plaintiff/Petitioner,

Vs.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant/Respondent

\* \* \* \*

KAREN WEISMANN

Plaintiff/Petitioner,

Vs.

SAFECO INSURANCE CO. OF ILLINOIS

Defendant/Respondent

---

**BRIEF OF PETITIONER KAREN WEISMANN IN  
RESPONSE TO AMICUS CURIAE BRIEF OF  
WASHINGTON STATE ASSOCIATION FOR JUSTICE**

---

SCHAUERMANN, THAYER, JACOBS & STAPLES, P.S.  
Craig F. Schauermann, WSBA # 7396  
Scott A. Staples, WSBA # 39325  
Attorneys for Plaintiff/Petitioner Karen Weismann  
1700 E. Fourth Plain Blvd.  
Vancouver, WA 98661  
(360) 695-4244

ORIGINAL

## TABLE OF CONTENTS

I.	IDENTITY OF PETITIONER .....	1
II.	INTRODUCTION AND STATEMENT OF THE CASE .....	1
III.	ISSUES PRESENTED FOR REVIEW .....	1
IV.	RESPONSE TO BRIEF OF AMICUS CURIAE.....	1
	<b>A.    The insurer is viewed in its separate capacities</b> <b>when acting under separate coverages.....</b>	<b>2</b>
	<b>B.    An insured should not be made worse off simply</b> <b>because she is covered by two coverages written</b> <b>by the same insurer under the same policy.....</b>	<b>4</b>
	<b>C.    When dealing with equitable fee sharing, there is</b> <b>no distinction between insureds.....</b>	<b>5</b>
	<b>D.    Subrogation and collateral source are red</b> <b>herrings.....</b>	<b>7</b>
V.	CONCLUSION.....	8
	DECLARATION OF SERVICE.....	10

## TABLE OF AUTHORITIES

### Cases

<i>Hamm v. State Insurance Company</i> , 151 Wash.2d, 88 P.3d 395 .....	2, 3, 4, 5, 7, 8
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998), .....	4, 5
<i>Olympic Steamship Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991) .....	9
<i>Safeco Inc. Co. v. Woodley</i> , 150 Wn.2d 765, 82 P.3d 660 (2004) .....	9
<i>Winters v. State Farm</i> , 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001) .....	2, 4, 7

### Statutes

RCW 48.22.005 .....	3, 6
---------------------	------

### Other Authorities

Amicus Brief .....	2, 4, 6, 7, 8
Clerk's Papers .....	3, 6

**I. IDENTITY OF PETITIONER**

Karen Weismann, Plaintiff in the trial court and respondent in the Court of Appeals, petitioned for and was granted review by the Supreme Court of the State of Washington.

**II. INTRODUCTION AND STATEMENT OF THE CASE**

In the interest of brevity Petitioner Karen Weismann refers the Court to the introduction and statement of the case presented by Amicus Curiae Washington State Association for Justice in its brief, and to her own Petition for Review.

**III. ISSUES PRESENTED FOR REVIEW**

Likewise, in the interest of brevity Petitioner Karen Weismann refers the Court to the issues presented for review presented by Amicus Curiae Washington State Association for Justice in its brief, and to her own Petition for Review.

**IV. RESPONSE TO BRIEF OF AMICUS CURIAE**

Petitioner Karen Weismann is in full agreement with the analysis set forth by Amicus Curiae Washington State Association for Justice in its brief. Amicus Curiae's briefing on the following key points should be paid special attention.

**A. The insurer is viewed in its separate capacities when acting under separate coverages.**

Amicus Curiae direct much of their focus towards what is one of the most basic and yet key points of this entire litigation: with regards to common fund and fee-sharing issues, an insurer is viewed in its separate, different capacities. *Hamm v. State Insurance Company*, 151 Wash.2d at 312-13, 319, 88 P.3d 395. Amicus Curiae also correctly notes that the critical error made by the insurers, the courts of appeals, and the dissents in cases like *Winters*, *Winters v. State Farm*, 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001) and *Hamm*, of attempting to collapse the analysis of benefit under different coverages. See Amicus Brief pg. 9, citing *Hamm* at 312 (rejecting Court of Appeals' conclusion that insurer received no benefit, instead focusing solely on benefit to insurer in its capacity as PIP carrier), at 313 n. 5 (criticizing dissent for not distinguishing between insurer's separate roles as PIP and UIM carrier), and at 319 (rejecting argument that insured did not benefit insurer in its capacity as UIM carrier "because the common fund benefitted State Farm in its capacity as PIP carrier, not as UIM carrier").

That the insurer is viewed in its different capacities when acting under different coverages is critical to the analysis. As noted *supra*,

whether or not the insurer received a benefit from the PIP insured's creation of a common fund is analyzed from the perspective of the insurer *in its capacity as PIP carrier*.<sup>1</sup> *Hamm*, of course, held that State Farm in its capacity as PIP carrier was benefited by the insured's efforts at creating a common fund, even though the recovery benefiting State Farm as PIP carrier was made from State Farm as UIM carrier under the same policy. *Hamm* should be held controlling in this case, as there is no principled distinction between the present case and *Hamm*.<sup>2</sup>

---

<sup>1</sup> Regarding the benefit to the insurer, it is worth mentioning again that *there would be no PIP offset for the PIP carrier to take without the efforts of Petitioners in creating the liability recoveries*. See Amicus Brief, pg. 12.

<sup>2</sup> Petitioner was an insured (by statute, per the policy, and by the parties' stipulation) under Kangas' PIP policy. CP at 74, #5; RCW 48.22.005 (5)(b)(ii). Petitioner incurred attorney fees and costs to recover her damages from Kangas' liability insurer, Safeco, and Safeco reduced its liability payment by the amount of the PIP benefits it had paid. CP at 74, #8. The fact that the insurer cutting the check here is acting in its capacity as liability carrier, and the insurer cutting the check in *Hamm* was acting in its capacity as UIM carrier, simply does not matter. Both insurers are in the same position, providing under the same policy the coverage that ends up being ultimately responsible for the damages caused by the tortfeasor, *as well as* PIP coverage.

**B. An insured should not be made worse off simply because she is covered by two coverages written by the same insurer under the same policy.**

As explained in the Amicus Brief, pg. 8-9, 11, one of the touchstones of both *Winters* and *Hamm* is that the insured should not be worse off simply because he or she purchased<sup>3</sup> two coverages from the same insurer. *Hamm* at 312, 88 P.3d 395, citing *Winters*, 144 Wn.2d at 882, 31 P.3d 1164. The court in *Hamm* stated: “State Farm would not be prejudiced by an application of *Mahler*, *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), and *Winters*; rather, not following *Mahler* and *Winters* would provide State Farm with a windfall when compared with separate carriers and would put Hamm in a worse position than if she had been covered by separate carriers.” 151 Wash.2d at 316, 88 P.3d 395.

Here, by following Safeco’s position Petitioner would be made worse off than if she had been covered by PIP and liability coverages

---

<sup>3</sup> Although “purchased” is the word used, “was covered by” would be more appropriate. The Court did not find who actually paid the premiums to be a controlling factor. See *Winters*, 144 Wn.2d at 874, 31 P.3d 1164 (Perkins, the PIP insured in the companion case to *Winters*, was a PIP insured by virtue of his being a permissive user of the named insured under the policy, and was still held entitled to equitable fee sharing by the PIP insurer). See also *Hamm*, 151 Wash.2d at 316, 88 P.3d 395

provided by separate insurers, and Safeco would receive a windfall compared to what the situation would be had it only provided PIP coverage. Our state's public policy of full compensation of insureds militates against such treatment of Petitioner and similarly situated PIP insureds. As stated in *Hamm*, PIP insurers may establish their rights of reimbursement and the mechanisms for the same in their policies, but only provided that the insurer "recognizes the public policy in Washington of full compensation of insureds and its other duties to insureds by statute, regulation, or common law." *Hamm* at 311, 88 P.3d 395, citing *Mahler*, 135 Wash.2d at 436, 957 P.2d 632.

**C. When dealing with equitable fee sharing, there is no distinction between insureds.**

Amicus Curiae are also correct in noting that the law has not distinguished between types of PIP insureds in the context of common fund and the right to equitable fee sharing, and that any distinctions the insurers attempt to make based upon how the PIP insured came to be an insured are untenable based upon the fact that the statute governing PIP

---

("...would put Hamm in a worse position than if she *had been covered by* separate carriers.")



insurance explicitly defines struck pedestrians as PIP insureds. See Amicus Brief, pg. 13. As noted *supra*, PIP insurers are commanded to recognize the public policy of full compensation of insureds, and live up to their other statutory, regulatory, and common law obligations to insureds. All PIP insureds are entitled to the benefit of equitable fee sharing when they create a common fund for the PIP insurer's benefit- there is no "second class" designation of insureds who are not the named, or premium paying insured.

Safeco agrees that Petitioner is a PIP "insured" under the policy issued to Kangas, see CP at 74. Nowhere in the sections of the policy defining PIP insureds or detailing reimbursement rights did Safeco give different levels of rights to different types of PIP insureds.<sup>4</sup> Nor would they have been permitted to. This is because nowhere in RCW 48.22.005<sup>5</sup>,

---

<sup>4</sup> Kangas' Safeco policy under the section entitled "Personal Injury Protection Coverage" defines "Insured" as: "(1) the named insured or any family member while occupying or a pedestrian struck by a motor vehicle; (2) Any other person while occupying or a pedestrian struck by your covered auto." Nowhere under this section does Safeco purport to differentiate between the rights to benefits of named insureds versus pedestrian or passenger insureds. CP at 38.

<sup>5</sup> RCW 48.22.005(5)(a)-(b) defines "Insured" as: "(a) The named insured or a person who is a resident of the named insured's household...or (b) A person who sustains bodily injury caused by accident while: (i) occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile."

in which PIP insureds are defined, are some PIP insureds given different levels of rights or other preferential treatment as to entitlement to benefits based on their status as named insureds, pedestrians, passengers, etc. The cases dealing with PIP insureds and their right to equitable fee sharing do not distinguish between insureds based upon whether the insured was the person to whom the policy was issued, a relative of the named insured, a permissive user of the insured's vehicle, a passenger, or a pedestrian, or whether the insured was the one who paid the premiums. See *Winters*, 144 Wn.2d at 874, 31 P.3d 1164 (PIP insured in *Perkins v. State Farm*, the companion case to *Winters*, was a permissive user of the named insured's vehicle).

**D. Subrogation and collateral source are red herrings.**

As Amicus notes at pg. 14 of its brief, the availability of subrogation to the PIP carrier is not relevant when an insurer recovers PIP benefits by means of reimbursement or offset, and does not negate its equitable fee-sharing obligations. *Hamm* was not decided based upon Hamm's carrier having someone to subrogate against. It was not mentioned as a rationale in the majority opinion, and the tortfeasor was uninsured, leaving as a practical matter no one to subrogate against.

Pro rata fee sharing is based on equitable principles. *Hamm*, 151 Wn.2d at 319. The equities here mandate that *Hamm* control, and that Ms. Weismann as a PIP insured is treated as equitably as other insureds.

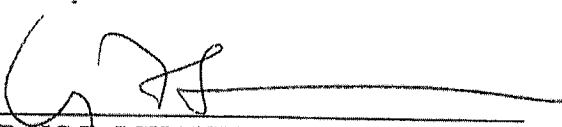
Petitioner agrees with Amicus Curiae (see Amicus Brief, pg. 14-15) that application or non-application of the collateral source rule has no bearing on the result in these cases. Whether or not a tortfeasor is entitled to credit for PIP payments made in underlying litigation does not relieve the PIP insurer of its obligation to equitably share in the PIP insured's attorney fees and costs when the PIP insured's efforts generate the common fund (the liability settlement) from which the reimbursement is made/offset is taken.

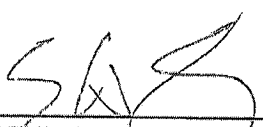
## V. CONCLUSION

The Court should adopt the analysis detailed in this brief, Petitioner Weismann's Petition for Review, and the briefing of Amicus Curiae and resolve the equitable sharing rule. Likewise, The Court should adopt the analysis detailed in Petitioner Weismann's Petition for Review, and the briefing of Amicus Curiae with regards to an award of attorney fees under

*Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and decide that issue accordingly. *Safeco Inc. Co. v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004), is controlling on the issue of whether *Olympic Steamship* fees should be awarded to Petitioner.

DATED this 16 day of May, 2011.

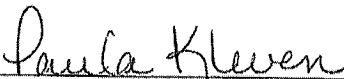
  
CRAIG H. SCHAUERMANN, WSBA 7396  
of Attorneys for Petitioner Karen Weismann

  
SCOTT A. STAPLES, WSBA 39325  
of Attorneys for Petitioner Karen Weismann

### DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. I hereby declare that I caused to be served a true copy of the within and foregoing document BRIEF OF PETITIONER KAREN WEISMANN IN RESPONSE TO AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION FOR JUSTICE upon the following attorney(s) of record at the address(es) shown on the 16 day of May, 2011:

Gregory Worden/Colleen Barrett Barrett & Worden, PS	<input type="checkbox"/> U.S. Mail, First Class, Postage Paid <input checked="" type="checkbox"/> E-Mail to cbarrett@barrett-worden.com
Matthew J. Ide Ide Law Office	<input type="checkbox"/> U.S. Mail, First Class, Postage Paid <input checked="" type="checkbox"/> E-Mail to mjide@yahoo.com
David R. Hallowell Law Office of David Hallowell	<input type="checkbox"/> U.S. Mail, First Class, Postage Paid <input checked="" type="checkbox"/> E-Mail to dhallowell@speakeasy.net
George M. Ahrend Ahrend Law Firm PLLC	<input type="checkbox"/> U.S. Mail, First Class, Postage Paid <input checked="" type="checkbox"/> E-Mail to gahrend@ahrendlaw.com
Kenneth E Payson Davis Wright Tremaine LLP	<input type="checkbox"/> U.S. Mail, First Class, Postage Paid <input checked="" type="checkbox"/> E-Mail to kenpayson@dwt.com

  
Date signed: 5/16/11  
Place signed: 1700 East Fourth Plain Blvd.  
Vancouver, Washington